IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1799 OF 1998

The Stonemann, a partnership firm duly registered under the Indian Partnership Act, 1932 and having its registered office at M.K. Bhawan, 3rd floor, Suite Nos.2 and 3, 300 Shahid Bhagatsingh Road, Fort, Mumbai - 400 001. ..PETITIONER.

Versus

1. The Board of Trustees of the Port of Mumbai, a statutory body incorporated under the Major Port Trust Act, 1963, having its office at Fort Bhawan, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai 400 038.

2. The Additional Docks Manager, Mumbai Port Trust, having his office at Fort Bhawan, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai - 400 038.

3. The Traffic Manager, Mumbai Port Trust, having his office at Fort Bhawan, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai - 400 038.

4. The Assistant Manager, (Sales), Sales Branch, Docks, Mumbai Port Trust, Operation Service Centre, 3rd floor, Opposite GPO, P.D'mellow Road, Mumbai - 400 001. ..RESPONDENTS.

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Ms.Shilpa Balani i/b. Anil Balani, Advocate for the Petitioner.
Mr.U.J.Makhija i/b. Mulla & Mulla, Advocate for the Respondents.

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CORAM : **DR.S.RADHAKRISHNAN AND SMT.V.K.TAHILRAMANI,JJ.**

DATED : **NOVEMBER 20, 2006.**

JUDGMENT: (PER SMT.V.K.TAHILRAMANI,J.)

1. In this Petition filed under Article 226 of the Constitution of India, the petitioner has impugned the decision communicated to them vide letter dated 22.8.1998 by the Mumbai Port Trust. By the said letter the petitioner was informed that the weight of rough marble blocks purchased by them in the auction is more than the declared quantity and hence they were called upon to pay the sale price for the difference in quantity of rough marble blocks, prior to taking delivery of the balance quantity of rough marble blocks.

2. The petitioner is a partnership firm inter alia engaged in business of trading in different types and kinds of marbles. Respondent No.1- the Board of Trustees of Mumbai Port Trust is a statutory body constituted under the provisions of the Major Port Trust Act, 1963 and respondent

Nos.2 to 4 are the officers of respondent No.1. On or about 6.7.1998, respondent No.1 announced the terms and conditions of a tender and auction sale of uncleared goods to be held on 18.8.1998. One of the items in the list of auction was three containers of Rough Perlato Marble blocks weighing 43570 Kgs.. The said goods were at Sr.No.3049 of the list. The reserve price for the goods was Rs.5,17,307/-. The auction sale took place on 18.8.1998 and admittedly the petitioner's bid of Rs.12,01,000/- for the lot of three containers of rough marble blocks was accepted and on the spot the petitioner paid a sum of Rs.2,50,000/-. On 19.8.1998 the balance amount of the consideration was paid by the petitioner.

3. It is the case of the petitioner that despite paying the entire amount the petitioner was allowed to take delivery of only two containers as the weight of all the three containers allegedly exceeded 43570 Kgs., which was the weight mentioned in the auction list. Hence, on that day, the petitioner had no option but to take delivery of only two containers. The petitioner sent a letter dated 21.8.1998 to respondent No.1 inter alia claiming delivery of

the third container, which according to the petitioner, was withheld on unreasonable grounds. By letter dated 22.8.1998, respondent No.2 informed the petitioner that since the weight of the marble blocks was more than the declared quantity, the petitioners were required to pay the sale price for the difference in quantity prior to taking delivery of the balance quantity. Being aggrieved by the said decision, the petitioner has preferred the present Petition.

4. At the time of admission, by order dated 9.10.1998, this Court directed respondent No.1 to release the goods i.e. the rough marble blocks in the last container on deposit of the amount of Rs.4,90,016/-, which was claimed by respondent no.1 as the amount due for the extra weight of marble. Pursuant to directions of this Court, the amount has been deposited by the petitioner in this Court and they have taken the delivery of the said marble blocks.

5. It is the case of the petitioner that as per the terms and conditions of the tender and auction sale, in certain cases offers were called for on "weight basis" and in other cases offers

were called for on "lot basis". The learned counsel for the petitioner submitted that the case of the petitioner was covered by "lot basis". In support of this submission, the learned counsel for the petitioner has placed reliance on Delivery Order dated 19.8.1998 wherein it is stated by respondent No.4 that the goods which have been sold to the petitioner on "LOT BASIS" be delivered to the petitioner. Thus, the learned counsel for the petitioner submitted that when the goods purchased by them in that auction were covered by "lot basis", the respondent-Mumbai Port Trust erred in refusing to deliver the balance of rough marble blocks on the ground that the weight of the marble blocks was more than the declared quantity and hence the petitioner would have to pay for the difference in the quantity prior to taking delivery of the balance quantity.

6. On the other hand, in the affidavit-in-reply of respondent No.4 affirmed on 28.9.1999 it is stated that three containers of rough marble blocks were brought by the vessel "Barzan". The Item No.2 on the Import General Manifest (IGM) bearing No.553 showed the consignment of three containers of rough marble

blocks. In the said IGM, the gross weight of the marble blocks as declared by the Vessel Agent was 43,574 Kgs.. As the consignment of rough marble blocks was not packed, the net weight and the gross weight of the consignment was the same. The consignment was discharged by the said Vessel Agent in the custody of the respondents on 23.2.1998. The Last Free Date of the Vessel was 4.3.1998. As the importer did not come forward to take delivery of the said consignment, the respondents sought to auction the consignment after the expiry of statutory period of two months. As per the existing policy of the respondents, the consignment was valued and the value of the consignment was fixed at Rs.11,873 per metric ton. As the consignment showed that the weight of the rough marble blocks was 43,574 Kgs. the reserve price in respect of the said consignment was fixed at Rs.5,17,307/- (43.570 tonnes X Rs.11,873/- per metric ton). When the consignment was put up for sale, the petitioners were the highest bidder, hence, the bid of the petitioner was accepted and the sale was confirmed in favour of the petitioner. However, after the consignment was auctioned, the Additional Docks Manager, Mr.C.S.Murty-respondent No.2 received an

anonymous phone call on 19.8.1998 inter alia informing him that the weight as disclosed in the Import General Manifest (IGM) was much less than the actual weight declared in the documents, i.e. it was less by 16790 Kgs.. Hence the consignment was weighed and it was found to be 60360 Kgs.

7. In the said affidavit-in-reply it is further stated that in several cases auction purchasers have sought to cancel the purchase and sought refund of the earnest money deposited, on the ground of discrepancy in declared weight and the actual weight. It is further stated that during the period from 1994-1998, respondent No.1 had to refund approximately an amount of Rs.90,36,000/- because of the discrepancies in the weight which was found to be less than the declared weight. In the same period it has also recovered Rs.10,62,000/- on account of discrepancies in the weight which was found to be more than the declared weight. It is further stated that under the provisions of the Major Port Trust Act, respondent No.1 is entitled to recover, from the importer, the deficit in sale if any arising out of the sale of cargo; and if the sale results in surplus they are bound to refund the

same to the importer. It is also stated that on the basis of declared weight i.e. 43570 Kgs. the charges of respondent No.1 would come approximately to Rs.4,04,390/- as on 28.9.1998 whereas the charges of the respondents on the basis of actual weight i.e. 60360 Kgs. would come to Rs.5,60,210/-. Thus, while calling upon the importer or while paying the surplus, the respondent No.1 has to furnish in detail the charges of respondent No.1. At that time, if the importer realises that the consignment was under-weighed, it would be open for the importer to make a claim against respondent No.1 by alleging malpractice on the part of respondent No.1.

8. In the affidavit filed on behalf of the respondents of Mr.Shamsunder Tiwari, the Assistant Docks Manager it is stated that on receiving the anonymous phone call, instructions were given by the Additional Docks Manager to weigh the consignment in presence of Auditors and Customs Appraiser. Accordingly, the consignment was weighed. At that time, Mr.Ajit Vora who had come with delivery order was present on behalf of the petitioner firm. When it was found that the

weight of the marble blocks was 60360 Kgs. and not 43570 Kgs. the representative of the petitioner was told that unless they agree to pay the proportionate additional price for the difference in weight, the delivery cannot be given to them. The representative of the petitioner agreed to pay the proportionate additional price and requested Mr.Shamsundar Tiwari to release two blocks and agreed to clear the third block on the next day on payment of additional charges. On his assurance being given, the petitioners were allowed to take delivery of two blocks and the third block was withheld.

9. As stated earlier, Ms.Balani, the learned counsel for the petitioner in support of the claim that the sale was on "lot basis" has relied on the list of auction (Exhibit "B") wherein the goods purchased by the petitioner have been mentioned. However, on perusal of the said list, we find that it is clearly stated therein that the three containers of rough marble blocks weighed 43570 Kgs.. Thus, it is seen that in the list of auction the weight of the rough marble blocks is clearly mentioned. The list of auction clearly shows that the weight of the rough marble blocks

was 43570 Kgs. whereas the actual weight was 60360 Kgs.. On receipt of the information that the consignment was grossly underweighed, the respondent No.1 being a statutory authority checked the weight of the consignment and it was found that though the declared weight was 43570 Kgs. the actual weight was found to be 60360 Kgs.. The weight of the three blocks was 22680 Kgs. 21436 Kgs. and 18910 Kgs.. As the weight of any two blocks of marble blocks came to about 40000 Kgs. two blocks were released and the third block was withheld by the respondents. In view of the fact that the weight of the rough marble blocks as shown on that Import General Manifest (IGM) as well as in the list of auction was 43570 Kgs. and the actual weight of the marble blocks was 50% more than that weight, in our view, the respondents had rightly withheld the third block/container and asked the petitioner to pay the price for the difference in quantity prior to taking delivery of the balance quantity of marble block. According to the respondents they were auctioning 43570 Kgs. of marble and not 60360 Kgs. of marble. The difference in weight being considerable, the respondents were well within their rights to ask for additional price for the

additional quantity. It cannot be said that the decision of the respondents to demand the additional consideration for 16790 Kgs. was in any way illegal. As noted earlier when all the three lots were weighed consequent to the anonymous telephone call, the petitioner's representative Mr.Ajit Vora was present. In addition, in the affidavit of respondent it is clarified that as per the existing practice if the lots had weighed less than the declared weight, the respondents were liable for refund of the proportionate amount. This has not been disputed by the petitioner and exactly the reverse has happened in the subject auction. The impugned decision therefore does not call for any interference and thus the petition fails.

10. Hence the Petition is dismissed. Rule is discharged.

11. As observed earlier, the petitioners have already deposited in this Court the price of the third block of marble i.e. Rs.4,90,016/-. The said amount with the accrued interest, if any, be given to respondent No.1.

[DR.S.RADHAKRISHNAN,J.]

[SMT.V.K.TAHILRAMANI,J.]